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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 JONATHAN DASHO,

11 Plaintiff,

12 v.

13 CITY OF FEDERAL WAY, et al.,

14 Defendants.

CASE NO. C12-1398JLR

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

15 **I. INTRODUCTION**

16 Before the court is Defendants City of Federal Way ("Federal Way"), Officer
17 Kelly Smith, and Officer Steven Wortman's motion for summary judgment on all of
18 Plaintiff Jonathan Dasho's claims. (Mot. (Dkt. # 44).) Mr. Dasho asserts claims under
19 42 U.S.C. § 1983 for excessive force. (*See generally* Compl. (Dkt. # 1).) Defendants'
20 motion counters that Officers Smith and Wortman ("the Officers") are entitled to
21 qualified immunity and that Mr. Dasho lacks evidence to support his claims against
22 Federal Way. (*See generally* Mot.) The court has considered the motion, all submissions

1 filed in support of and opposition thereto, the balance of the record, and the relevant law
 2 and held oral argument on June 12, 2015. Being fully advised, the court GRANTS
 3 Defendants' motion and dismisses Mr. Dasho's claims with prejudice.

4 **II. BACKGROUND**

5 The following facts are undisputed unless otherwise noted: On the evening of
 6 August 19, 2009, Federal Way Police Officers Smith and Wortman responded to a call
 7 about a domestic disturbance outside Mr. Dasho's apartment. *State v. Dasho*, 171 Wash.
 8 App. 1030, at *1 (Wash. Ct. App. 2012).¹ That day was the birthday of Mr. Dasho's
 9 older brother, Jared Dasho ("Jared"), and Jared had come over to Mr. Dasho's apartment
 10 in the afternoon to celebrate. *Id.*; (Miller Decl. (Dkt. # 45) ¶ 3 Ex. A ("Jared Dep.") at
 11 15:17-16:11.) The brothers marked the occasion by drinking a substantial amount of
 12 vodka. *Dasho*, 171 Wash. App. at *1; (*see also* Jared Dep. at 16:12:19, 21:15-20; 22:5-9;
 13 Miller Decl. ¶ 4 Ex. B ("Breen Dep.") at 20:2-7, 21:16-22:1.) Mr. Dasho's girlfriend,
 14 Emily Breen, was also present but drank only a small amount. (Breen Dep. at 20:8-11.)
 15 As the evening progressed, Mr. Dasho and Jared became heavily intoxicated. *Dasho* 171
 16 Wash. App. at *1; (*see also* Breen Dep. at 21:16-17; Jared Dep. 22:13-23:9.)

17 The disturbance that brought the officers was a fistfight between Mr. Dasho and
 18 Jared that took place on the sidewalk in front of Mr. Dasho's apartment. *See Dasho*, 171

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20 ¹ In laying out what occurred on August 19, 2009, the court cites extensively to the
 Washington Court of Appeals' opinion in Mr. Dasho's criminal case, *State v. Dasho*, 171 Wash.
 21 App. 1030 (Wash. Ct. App. 2012). Mr. Dasho has expressly adopted its account of what
 22 occurred that night (Resp. (Dkt. # 55) at 2 ("The Court of Appeals Opinion . . . objectively sets
 forth the facts as follows")), and the facts cited from the court of appeals' opinion are
 consistent with Defendants' version of events.

1 Wash. App. at *1; (Wortman Decl. (Dkt. # 46) ¶ 3 Ex. B (“Wortman Report”) at 1.) Mr.
 2 Dasho struck Jared in the head, causing Jared to apparently lose consciousness, fall to the
 3 ground, and hit his head on the pavement. (Breen Dep. 23:23-24:3, 32:5-34:3.)
 4 Following the fight, Mr. Dasho, Jared, and Ms. Breen made their way back into the
 5 apartment. *See Dasho*, 171 Wash. App. at *1; (Breen Dep. at 35:1-24.) Neighbors
 6 observed the fight and reported it to the police. *Dasho*, 171 Wash. App. at *1; (*see also*
 7 Wortman Report at 1; Smith Decl. (Dkt. # 47) ¶ 3 Ex. B (“Smith Report”) at 1.)

8 Officers Smith and Wortman arrived at Mr. Dasho’s apartment complex around
 9 9:30 p.m. and approached Mr. Dasho’s apartment. (Smith Report at 1; Wortman Report
 10 at 1); *see also Dasho*, 171 Wash. App. at *1. They noticed a small pool of blood on the
 11 landing as they made their way to the door. (Wortman Report at 1; Smith Report at 1.)
 12 The Officers looked into a window near the door but could see no one in the apartment.
 13 (Wortman Report at 1; Smith Report at 2.) They knocked, announced their presence, and
 14 demanded to be let in but initially no one responded. (*See* Wortman Report at 1; Smith
 15 Report at 2.) Officer Smith then went back to the window whereupon he noticed a naked
 16 male, Mr. Dasho, lying on his side on the floor. (Smith Report at 2; Wortman Report at
 17 1-2.)

18 Shortly thereafter, Jared let the Officers into the apartment. *Dasho*, 171 Wash.
 19 App. at *1; (*see also* Wortman Report at 2; Smith Report at 2; Jared Dep. at 31:17-22.)
 20 Upon entering, the Officers found themselves on one side of the living room. (*See*
 21 Wortman Report at 1.) The living room was small, with entrances to the hallway and
 22 kitchen in the corner opposite to where the Officers were standing and to their right as

1 they looked across the room. (*See* Noedel Decl. (Dkt. # 48) ¶ 3 Ex. B (“Noedel Report”)
2 at 6, 8.) Ms. Breen was at the other end of the living room, to the left of the Officers, and
3 Jared was near the Officers. (*See id.* at 8; Wortman Report at 2; Breen Dep. at 49:5-7,
4 49:21-50:1.) Mr. Dasho, who had been lying on the living room floor, jumped up and ran
5 into the kitchen. *Dasho*, 171 Wash. App. at *1; (Breen Dep. at 50:7-51:19; Wortman
6 Report at 1.)

7 Officer Wortman ordered Mr. Dasho to stop, but Mr. Dasho ignored that
8 command and began rummaging in a kitchen drawer. (Wortman Report at 2; Breen Dep.
9 at 51:18-53:4.) Officer Wortman repeated the command several more times; however,
10 Mr. Dasho continued to ignore him. (Wortman Report at 2.) The Officers began to fear
11 that Mr. Dasho might be attempting to arm himself. (Wortman Report at 2; *see also*
12 Smith Report at 2.) They drew their guns. (*See* Wortman Report at 2; Smith Report at 2;
13 Breen Dep. at 55:2-18.) Mr. Dasho grabbed a table knife from the drawer, came back out
14 of the kitchen at a rapid pace, and ran toward the Officers while raising the knife over his
15 head. *Dasho*, 171 Wash. App. at *1; (*see also* Wortman Report at 2; Smith Report at 2;
16 Breen Dep. at 53:5-54:17.) At that point, Mr. Dasho was roughly five to ten feet away
17 from the Officers. (*See* Noedel Report at 6, 8-9.)

18 The Officers shouted at Mr. Dasho to stop, but he again ignored them. *See Dasho*,
19 171 Wash. App. at *1; (Breen Dep. at 54:18-23.) Both Officers then fired their handguns
20 at Mr. Dasho. (Wortman Report at 2; Smith Report at 2.) Officer Wortman fired seven
21 times, and Officer Smith fired six times. (Noedel Report at 6-7.) In all, eleven of the
22 thirteen bullets struck Mr. Dasho. (*Id.*) The shooting lasted no more than three

1 seconds—Ms. Breen estimates that it lasted only one-and-a-half seconds (*see* Breen Dep.
2 at 59:4-10; Noedel Report at 7)—and only around 10 seconds passed from the time the
3 Officers entered the apartment to the end of the shooting (Breen Dep. at 49:11-20).

4 The Officers did not administer medical aid to Mr. Dasho immediately after the
5 shooting. (*See* Wortman Report at 2-3; Smith Report at 2-3.) Officer Smith explains that
6 he did not believe it was safe to do so because there were only two officers at the scene,
7 other people were in the apartment, the knife had fallen near where Mr. Dasho came to
8 rest, and the Officers did not know if anyone was hiding in the unseen parts of the
9 apartment. (*See* Smith Report at 3.) The Officers did, however, promptly call for
10 medical help. (*See* Staskiewicz Decl. (Dkt. # 49) ¶ 3 Ex. B (“Staskiewicz Report”) at 15
11 (noting that only 54 seconds elapsed from the Officers’ report of contact with the
12 occupants of the apartment and their report of the shooting and request for medical
13 assistance); *see also* Wortman Report at 3.) That help, along with additional officers,
14 arrived in under four minutes (Staskiewicz Report at 15), after which Officers Smith and
15 Wortman departed the scene (Wortman Report at 3; Smith Report at 3).

16 Following the events of August 19, 2009, the State of Washington charged Mr.
17 Dasho with two counts of assaulting a police officer and two counts of assault with a
18 deadly weapon. (Miller Decl. ¶ 12 Ex. J (amended information).) The case went to trial,
19 and the jury convicted Mr. Dasho of the first two counts but acquitted him of the latter
20 two. *See Dasho*, 171 Wash. App. at *2. Mr. Dasho appealed his conviction on several
21 grounds, but the Washington Court of Appeals denied his appeal. *Id.* at *1.

1 In August 2012, Mr. Dasho filed this action under 42 U.S.C. § 1983 alleging that
2 Officers Smith and Wortman violated his Fourth and Fourteenth Amendment rights by
3 using excessive force against him. (*See* Compl. at 1, ¶¶ 1.1, 6.1.) Mr. Dasho's complaint
4 also contains a cause of action against Federal Way, which he asserts caused the violation
5 of his rights through its policies and customs and by ratifying the Officers' conduct. (*See*
6 *id.* ¶¶ 4.13, 4.19, 6.2.) Defendants now bring a motion for summary judgment against all
7 of Mr. Dasho's claims. (*See* Mot. at 1, 24.) Defendants argue that Officers Smith and
8 Wortman have qualified immunity on Mr. Dasho's claims against them, and that Mr.
9 Dasho's claims against Federal Way lack evidentiary support. (*See* Mot. at 8.)
10 Defendants' motion is now before the court.

11 III. DISCUSSION

12 A. Summary Judgment Standard

13 Summary judgment is appropriate if the evidence, when viewed in the light most
14 favorable to the nonmoving party, demonstrates "that there is no genuine dispute as to
15 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.
16 P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*,
17 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing
18 there is no genuine issue of material fact and that he or she is entitled to prevail as a
19 matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden,
20 then the nonmoving party "must make a showing sufficient to establish a genuine dispute
21 of material fact regarding the existence of the essential elements of his case that he must
22 prove at trial" in order to withstand summary judgment. *Galen*, 477 F.3d at 658.

1 In determining whether the fact-finder could reasonably find in the nonmoving
 2 party's favor, "the court must draw all reasonable inferences in favor of the nonmoving
 3 party, and it may not make credibility determinations or weigh the evidence." *Reeves v.*
 4 *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Nevertheless, the
 5 nonmoving party "must do more than simply show that there is some metaphysical doubt
 6 as to the material facts Where the record taken as a whole could not lead a rational
 7 trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Scott v.*
 8 *Harris*, 550 U.S. 372, 380 (2007) (internal quotation marks omitted) (quoting *Matsushita*
 9 *Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). The court may
 10 only consider admissible evidence when ruling on a motion for summary judgment. *Orr*
 11 *v. Bank of Am., NT & SA*, 285 F.3d 764, 773-75 (9th Cir. 2002).

12 **B. Qualified Immunity**

13 In the context of 42 U.S.C. § 1983 claims, "[t]he doctrine of qualified immunity
 14 protects government officials 'from liability for civil damages insofar as their conduct
 15 does not violate clearly established statutory or constitutional rights of which a
 16 reasonable person would have known.'" *Stanton v. Sims*, --- U.S. ---, 134 S.Ct. 3, 4-5
 17 (2013) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).
 18 "Qualified immunity gives government officials breathing room to make reasonable but
 19 mistaken judgments," and "protects all but the plainly incompetent or those who
 20 knowingly violate the law." *Ashcroft v. al-Kidd*, --- U.S. ---, 131 S. Ct. 2074, 2085 (2011)
 21 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Accordingly, an officer will be
 22 denied qualified immunity in a § 1983 action "only if (1) the facts alleged, taken in the

1 light most favorable to the party asserting injury, show that the officer's conduct violated
 2 a constitutional right, and (2) the right at issue was clearly established at the time of the
 3 incident such that a reasonable officer would have understood her conduct to be unlawful
 4 in that situation.”” *Green v. City & Cnty. of San Fran.*, 751 F.3d. 1039, 1051-52 (9th Cir.
 5 2014) (quoting *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011)).

6 **C. Excessive Force**

7 In evaluating a Fourth Amendment claim of excessive force, courts ask “whether
 8 the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances
 9 confronting them.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). This inquiry “requires
 10 a careful balancing of the nature and quality of the intrusion on the individual’s Fourth
 11 Amendment interests against the countervailing governmental interests at stake.” *Id.* at
 12 396. “The calculus of reasonableness must embody allowance for the fact that police
 13 officers are often forced to make split-second judgments—in circumstances that are
 14 tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a
 15 particular situation.” *Id.* at 396-97. As such, reasonableness is evaluated “from the
 16 perspective of a reasonable officer on the scene, rather than with the 20/20 vision of
 17 hindsight.” *Glenn v. Wash. Cnty.*, 673 F.3d 864, 871 (9th Cir. 2011) (citing *Graham*, 490
 18 U.S. at 397). Police officers “need not avail themselves of the least intrusive means of
 19 responding”; rather, they need only act “within that range of conduct [identified] as
 20 reasonable.” *Billington v. Smith*, 292 F.3d 1177, 1188-89 (9th Cir. 2002).

21 The excessive force analysis involves three steps. First, a court must “assess the
 22 severity of the intrusion on the individual’s Fourth Amendment rights by evaluating the

1 type and amount of force inflicted.” *Glenn*, 673 F.3d at 871. Second, a court must
2 “evaluate the government’s interest in the use of force.” *Id.* At a minimum, three factors
3 inform the government’s interest: “(1) how severe the crime at issue is, (2) whether the
4 suspect posed an immediate threat to the safety of the officers or others, and (3) whether
5 the suspect was actively resisting arrest or attempting to evade arrest by flight.” *Lal v.*
6 *California*, 746 F.3d 1112, 1117 (9th Cir. 2014); *see also Mattos v. Agarano*, 661 F.3d
7 433, 441 (9th Cir. 2011) (noting that these factors are not exclusive and that courts
8 consider “whatever specific factors may be appropriate in a particular case”). Of these
9 the most important is whether the suspect posed an immediate threat to the safety of the
10 officers or others. *Lal*, 746 F.3d at 1117; *see also Glenn*, 673 F.3d at 872. Finally, a
11 court must “balance the gravity of the intrusion on the individual against the
12 government’s need for that intrusion.” *Id.*

13 Because the excessive force inquiry ordinarily “requires a jury to sift through
14 disputed factual contentions, and to draw inferences therefrom,” the Ninth Circuit has
15 emphasized that “summary judgment . . . in excessive force cases should be granted
16 sparingly.” *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (en banc).
17 However, the Supreme Court has made clear that, at the summary judgment stage, once a
18 court has determined the relevant set of facts and drawn all inferences in favor of the
19 nonmoving party, the reasonableness of an officer’s actions remains a question of law for
20 the court to decide. *Scott*, 550 U.S. at 381 n.8; *see also Gonzalez v. City of Anaheim*, 747
21 F.3d 789, 801 (9th Cir. 2014) (J. Trott, Kozinski, Tallman, and Bea, *dissenting*).
22

1 In this case, Mr. Dasho asserts that Officers Smith and Wortman used excessive
2 force against him in two respects—by shooting him and by failing to promptly render
3 medical care. (*See* Compl.; Resp. at 5-10.) Officers Smith and Wortman move for
4 summary judgment on Mr. Dasho’s excessive force claims, arguing that they are entitled
5 to qualified immunity. (*See* Mot. at 8-17.) As such, the court must determine (1)
6 whether the Officers used force that was objectively reasonable in light of the facts and
7 circumstances confronting them, *see Graham*, 490 U.S. at 397; *Green*, 751 F.3d at 1051-
8 52, and (2) if not, whether their use of force was clearly unreasonable in light of the law
9 as it then existed, *see Green*, 751 F.3d at 1051-52. In answering these questions, the
10 court must view the facts in the light most favorable to Mr. Dasho and draw all
11 reasonable inferences in his favor. *See Reeves*, 530 U.S. at 150; *see also Scott*, 550 U.S.
12 at 381 n.8.

13 1. The Shooting

14 a. *Relevant facts & Defendants’ motion to strike*

15 Before proceeding to the excessive force analysis with respect to the shooting, the
16 court first establishes the relevant facts, drawing all inferences in favor of Mr. Dasho.
17 *See Scott*, 550 U.S. at 381 n.8. As discussed in greater detail above, *see supra* Part II, the
18 following facts are undisputed: The Officers responded to a report of a fight at Mr.
19 Dasho’s apartment. After the Officers entered the apartment, Mr. Dasho, who was naked,
20 ran into the kitchen where he grabbed a table knife from a drawer. Officer Wortman
21 ordered Mr. Dasho to stop, but Mr. Dasho ignored that command. Mr. Dasho then
22 entered the living room at a rapid pace, ignoring continued commands to stop, and ran

1 toward the Officers while raising the knife over his head. The Officers fired their guns
2 thirteen times in the space of 1.5 to 3 seconds, hitting Mr. Dasho 11 times. These events
3 occurred in close quarters and within a short period of time.

4 The parties' only factual disagreement relates to what Mr. Dasho and the Officers
5 did in the moments just before and just after the shooting began. The Officers maintain
6 that Mr. Dasho charged directly at them without turning. (Wortman Decl. ¶ 5; Smith
7 Decl. ¶ 5.) They admit that they continued to shoot Mr. Dasho as he fell to the ground
8 but contend that Mr. Dasho was still moving toward them as he fell and that they stopped
9 firing when he hit the ground. (*See* Wortman Decl. ¶ 6; Miller Decl ¶ 6 Ex. D
10 ("Wortman Testimony") at 55:2-56:2, 57:16-24; Smith Decl. ¶ 6; Smith Report at 2;
11 Miller Decl. ¶ 7 Ex. E ("Smith Testimony") at 91:1-10, 94:16-95:11, 95:18-96:12.) In
12 support of their position on this issue, the Officers offer their own sworn declarations (*see*
13 Wortman Decl. ¶¶ 5-6; Smith Decl. ¶¶ 5-6; Wortman Report at 2; Smith Report at 2),
14 their testimony from Mr. Dasho's criminal trial (*see* Wortman Testimony at 55-57; Smith
15 Testimony at 91, 94-96), and Ms. Breen's deposition testimony (*see* Breen Dep. at 53-54,
16 58-60). Ms. Breen's account of events is consistent with the Officers' testimony. (*See*
17 *id.*)

18 Mr. Dasho disagrees with the Officers. He argues that he turned away from the
19 Officers before the shooting started. (*See* Resp. at 4, 7-8.) He also argues that the
20 Officers continued shooting him after he "fell to the ground and was immobilized."
21 (Resp. at 7; *see also id.* at 4, 8, 11.) Yet neither Mr. Dasho nor Jared remembers what
22 occurred between Mr. Dasho and the Officers. (*See* Miller Decl. ¶ 5 Ex. C ("Dasho

1 Dep.”) at 82:20-83:1, 85:2-86:22; Jared Dep. at 35:25-38:13.) As such, Mr. Dasho’s only
 2 evidence to support his version of events comes from his forensics expert, Kay Sweeney.
 3 (See Resp.) Defendants move to strike this evidence. (See Reply (Dkt. # 57) at 2-3.)

4 Most of Mr. Dasho’s evidence is inadmissible and must be stricken. *See Orr*, 285
 5 F.3d at 773 (“A trial court can only consider admissible evidence in ruling on a motion
 6 for summary judgment.”). The court has already ruled that many of Mr. Sweeney’s
 7 opinions are inadmissible because they are unreliable. (See 4/27/15 Order (Dkt. # 64).)
 8 Even to the extent Mr. Sweeney’s opinions survived the court’s prior order, however, Mr.
 9 Dasho has not offered most of those opinions in an admissible form. Mr. Dasho offers
 10 only Mr. Sweeney’s report, which is unsworn, and five pages of the transcript of Mr.
 11 Sweeney’s testimony at Mr. Dasho’s criminal trial. (See Lohraff Decl. (Dkt. # 56) ¶ 3
 12 Ex. 1 (“Sweeney Report”), ¶ 4 Ex. 2 (“Sweeney Testimony”)).

13 The court does not consider Mr. Sweeney’s unsworn report in ruling on
 14 Defendants’ motion. “[C]ourts in this circuit have routinely held that unsworn expert
 15 reports are inadmissible” and may not be considered as summary judgment evidence.
 16 *Harris v. Extendicare Homes, Inc.*, 829 F. Supp. 2d 1023, 1027 (W.D. Wash. 2011)
 17 (citing *Aecon Bldgs., Inc. v. Zurich N. Am.*, 572 F. Supp. 2d 1227, 1237 (W.D. Wash.
 18 2008); *Shuffle Master, Inc. v. MP Games LLC*, 553 F. Supp. 2d 1202, 1210-11 (D. Nev.
 19 2008) (collecting cases)); *see also* Fed. R. Civ. P. 56(c). Accordingly, the court grants
 20 Defendants’ motion as to Mr. Sweeney’s report and strikes that document (Dkt. # 56-1).

21 Defendants also move to strike the excerpts from Mr. Sweeney’s trial testimony.
 22 (Reply at 2-3.) They argue that the testimony lacks foundation because it fails to show

1 Mr. Sweeney's qualifications to testify as an expert, the methods he used to reach his
2 conclusions, or the materials he reviewed. (*See id.*) The court rejects this argument. In
3 ruling on Defendants' motions to exclude Mr. Sweeney's testimony, the court has
4 become quite familiar with Mr. Sweeney's opinions in this case, his qualifications, and
5 his testimony at Mr. Dasho's criminal trial. (*See, e.g.*, 4/27/15 Order; 11/4/14 Order
6 (Dkt. # 58).) Indeed, the court has already held, without objection from Defendants, that
7 Mr. Sweeney is qualified to testify as an expert on forensic science. (4/27/15 Order at 8-
8 9.) Moreover, the court has reviewed the bulk of Mr. Sweeney's former trial testimony,
9 which Mr. Dasho submitted in connection with Defendants' motions to exclude and
10 which describes Mr. Sweeney's qualifications, methods, and analysis of the evidence in
11 this case. (*See* Dkt. ## 61-1 – 6-3.) The court finds that the record adequately establishes
12 a foundation for the excerpts of Mr. Sweeney's former testimony at issue here and
13 therefore denies this aspect of Defendants' motion to strike. (*See id.*; *see also* 4/27/15
14 Order.)

15 Nevertheless, without Mr. Sweeney's report, Mr. Dasho relies on just five pages of
16 Mr. Sweeney's former trial testimony as evidence to oppose summary judgment. (*See*
17 Sweeny Testimony (Dkt. # 56-2).) In those pages, Mr. Sweeney opines that Mr. Dasho
18 did not receive any wounds "directly face on" (*id.* at 82), was along the east wall when he
19 was shot (*id.*), and ended up falling face down near the entrance to the kitchen (*id.* at 141-
20 42). Mr. Sweeney also notes that he recovered a bullet from the floor near where Mr.
21 Dasho fell and that this bullet did not go through Mr. Dasho. (*Id.* at 144-45.)

1 This evidence provides scant support for Mr. Dasho's version of events. Even
 2 drawing all inferences in favor of Mr. Dasho, no rational jury could conclude that
 3 Officers Smith and Wortman continued to shoot Mr. Dasho after he "fell to the ground
 4 and was immobilized." (Resp. at 7; *see also id.* at 4, 8, 11.) Officers Smith and Wortman
 5 both testify that they stopped shooting at Mr. Dasho after he fell to the ground. (Smith
 6 Decl. ¶ 6; Wortman Decl. ¶ 6.) Although the court may not simply accept the testimony
 7 of defendant-officers if their testimony is internally inconsistent or inconsistent with
 8 other evidence in the record, *see Cruz v. City of Anaheim*, 765 F.3d 1076, 1079 (9th Cir.
 9 2014); *Reynolds v. Cnty. of San Diego*, 84 F.3d 1162, 1169-70 (9th Cir. 1996), *overruled*
 10 *on other grounds by Acri v. Varian Associates, Inc.*, 114 F.3d 999 (9th Cir. 1997); *Scott*
 11 *v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994), no such inconsistency exists here. The
 12 Officers' testimony displays no internal inconsistency, and Ms. Breen, who was Mr.
 13 Dasho's girlfriend and is the only other eyewitness who remembers what occurred,
 14 corroborates the Officers' testimony.² (*See* Breen Dep. at 59:20-22); *see also Reynolds*,
 15 84 F.3d at 1069-70 (noting that two independent eyewitnesses corroborated the
 16 defendant-officer's version of events).

17 Nor does the physical evidence or any expert testimony contradict the Officers'
 18 testimony that they did not shoot Mr. Dasho after he lay immobilized on the ground.

19 _____
 20 ² At oral argument, Mr. Dasho's counsel characterized Ms. Breen as a neutral witness but
 21 stated that Ms. Breen did not testify as to whether the Officers continued to shoot at Mr. Dasho
 22 after he fell to the floor. The latter aspect of counsel's statement is inaccurate. Ms. Breen
 testified at her deposition that the Officers did not shoot at Mr. Dasho after he fell to the ground.
 (Breen Dep. at 59:20-22 ("Q: Did the officer fire any shots at Jonathan once he was down on the
 floor? A: No.").)

1 Indeed, even Mr. Sweeney, Mr. Dasho's only source of evidence, does not interpret the
2 physical evidence in the manner suggested by Mr. Dasho.³ Rather Mr. Sweeney opines
3 only that Mr. Dasho had his side turned to the Officers during the shooting, and that the
4 Officers shot at Mr. Dasho as he fell to the floor. (*See, e.g.*, Dkt. # 61-2 at 52-62.) At
5 most, therefore, a reasonable jury could conclude that Mr. Dasho turned away from the
6 Officers just before or during the shooting, and that the Officers continued to shoot at Mr.
7 Dasho as he fell to the floor.

8 Having established the relevant set of facts and drawn all reasonable inferences in
9 Mr. Dasho's favor, the court turns to its attention to whether Officers Smith and Wortman
10 have qualified immunity against Mr. Dasho's excessive force claims.

11 *b. Constitutional violation*

12 The court begins its qualified immunity analysis with the question of whether
13 Officers Smith and Wortman used excessive force against Mr. Dasho. *See Graham*, 490
14 U.S. at 397; *Green*, 751 F.3d at 1051-52. In answering that question, the court first
15 assesses the severity of the intrusion on Mr. Dasho's Fourth Amendment interests by
16 evaluating the type and amount of force inflicted. *See Glenn*, 673 F.3d at 871. Officers
17 Smith and Wortman fired their handguns at Mr. Dasho, which constitutes a use of deadly
18 force. *See Tennessee v. Garner*, 471 U.S. 1, 4 (1985). Deadly force is constitutionally
19 permissible only where "the officer has probable cause to believe that the suspect poses a

20

21 ³ Mr. Dasho's counsel confirmed at oral argument that Mr. Dasho relies heavily on Mr.
22 Sweeney to support the argument that the Officers continued to shoot Mr. Dasho after Mr. Dasho
fell to the floor.

1 threat of serious physical harm, either to the officer or to others,” such as “if the suspect
 2 threatens the officer with a weapon.” *Id.* at 11-12. In addition, the Officers employed a
 3 substantial amount of force, firing at Mr. Dasho 13 times and hitting him 11 times,
 4 although they applied that force within a short period of time—between 1.5 and 3
 5 seconds. (*See* Noedel Report at 6-7; Breen Dep. at 59:4-10.)

6 Next, the court turns to the Government’s interest in the use of force. *See Glenn*,
 7 673 F.3d at 871. The key consideration here is whether Mr. Dasho posed an immediate
 8 threat to the safety of the Officers or others. *See id.* at 872; *Lal*, 746 F.3d at 441. Mr.
 9 Dasho was a muscular individual at the time of shooting. (Wortman Decl. ¶ 5; Smith
 10 Decl. ¶ 5; *see also* Breen Dep. at 60:6-22.) He ignored police commands to stop and
 11 instead grabbed a table knife from the kitchen, moved quickly out into the living room,
 12 and ran toward the Officers, placing himself in close proximity to the Officers, Jared, and
 13 Ms. Breen. *See Dasho*, 171 Wash. App. at *1; (Wortman Report at 2; Smith Report at 2;
 14 Breen Dep. at 51:18-54:17; Noedel Report at 6, 8-9.) As he entered the living room and
 15 advanced toward the Officers, he raised the knife over his head. *See Dasho*, 171 Wash.
 16 App. at *1; (*see also* Wortman Report at 2; Smith Report at 2; Breen Dep. at 53:5-54:17.)
 17 This conduct made Mr. Dasho an immediate threat to the safety of the Officers as well as
 18 Ms. Breen and Jared. *Cf. Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1116-18 (9th
 19 Cir. 2005) (finding reasonable deputies’ conclusion that the suspect posed a threat of
 20 serious physical harm where the suspect was armed with a sword, had not responded to
 21 orders to stop and give up his weapon, and was trying to get inside a private resident
 22 where others might be in danger); *Reynolds*, 84 F.3d at 1168 (finding that suspect who

1 behaved erratically and swung a knife at the defendant-officer “threatened [the officer’s]
2 life or at least put him in fear of great bodily injury”).

3 That Mr. Dasho may have turned his side to the Officers does not alter this
4 conclusion. (*See Sweeney Testimony at 82.*) To begin, any turns may have been
5 contortions made while Mr. Dasho advanced on the Officers. If that was the case, the
6 threat did not decrease as a result. Moreover, even if turns amounted to changes of
7 direction, Mr. Dasho remained an immediate threat to the physical safety of those in the
8 apartment. (*See Wortman Decl. ¶ 5; Smith Decl. ¶ 5.*) In reaching this conclusion, the
9 court is mindful that although on summary judgment it must view the facts in the light
10 most favorable to Mr. Dasho, the excessive force inquiry demands that the court also
11 view the facts from the perspective of a reasonable officer in the shoes of Officers Smith
12 and Wortman. *See Torres v. Madera*, 648 F.3d 1119, 1124 (9th Cir. 2011). Thus, the
13 court must consider whether, from Officers Smith and Wortman’s perspective, a
14 reasonable officer would have viewed Mr. Dasho’s actions, including any turns or
15 changes of direction, as an immediate threat to the safety of those in the apartment. *See*
16 *id.*

17 The court has no trouble answering that question in the affirmative. Once the
18 Officers entered the apartment, events unfolded rapidly. Mr. Dasho behaved erratically,
19 ignored police commands, and assaulted the Officers. *See Dasho*, 171 Wash. App. at *1,
20 4 (noting that Mr. Dasho could have committed assault either by placing the Officers in
21 reasonable apprehension of bodily harm or by attempting to inflict bodily harm on them
22 while having the apparent present ability to do so); (Wortman Report at 2; Smith Report

1 at 2; Breen Dep. at 51:18-54:17.) A reasonable officer would not perceive Mr. Dasho's
2 turning away as removing the threat to those in the apartment. Mr. Dasho could have
3 been attempting to attack Ms. Breen, who was also in the living room. (See Smith Report
4 at 2.) He also could have retreated to another part of the apartment and attacked someone
5 else—the Officers did not know whether anyone else was in another part of the
6 apartment. See *Blanford*, 406 F.3d 1116-18; (Wortman Report at 3; Smith Report at 3.)
7 Finally, the living room was small, Mr. Dasho was already within a few feet of the
8 Officers, and he could have quickly resumed his advance on them. (See Noedel Report at
9 6, 8-9; Wortman Decl. ¶ 5; Smith Decl. ¶ 5.) Given the situation confronting the
10 Officers, a reasonable officer could have concluded that Mr. Dasho posed an immediate
11 threat to the safety of those in the apartment even if he turned or changed directions. See
12 *Torres*, 648 F.3d at 1124; *Blanford*, 406 F.3d 1116-18.

13 Also relevant to the Government's interest are the severity of the crime at issue
14 and whether Mr. Dasho was actively attempting to resist or evade arrest. *Lal*, 746 F.3d at
15 441; *Glenn*, 673 F.3d at 871. Officers Smith and Wortman had responded to a call about
16 a fight, been directed to Mr. Dasho's apartment, and observed a pool of blood outside Mr.
17 Dasho's apartment. See *Dasho*, 171 Wash. App. at *1; (Wortman Report at 1; Smith
18 Report at 1.) Thus, Mr. Dasho was likely suspected of being involved in a battery in
19 which someone might have been injured. (See Wortman Report at 1.) Furthermore,
20 when he advanced on the Officers with a knife raised over his head, Mr. Dasho
21 committed assault against police officers, *Dasho*, 171 Wash. App. at *1, a serious
22 offense, see *Mobley v. Palm Beach Cnty. Sheriff Dep't*, 783 F.3d 1347, 1356 (11th Cir.

1 2015) (characterizing “assaulting a police officer with a deadly weapon” as a “serious
 2 crime”); *Caldwell v. City of Selma*, No. 1:13-cv-00465- SAB, 2014 WL 4275513, at *8
 3 (C.D. Cal. Aug. 19, 2014) (finding that “assault and battery on a police officer” are
 4 relatively severe crimes that “weigh[] in favor of the use [deadly] of force”). In addition,
 5 Mr. Dasho was actively resisting arrest as he ignored repeated commands to stop and
 6 instead moved aggressively toward the Officers. *See Dasho*, 171 Wash. App. at *1; (*see*
 7 *also* Wortman Report at 2; Smith Report at 2; Breen Dep. at 53:5-54:23.)

8 Finally, the court weighs the government’s interest in the use of force against the
 9 intrusion on Mr. Dasho’s Fourth Amendment rights to determine whether the use of force
 10 was reasonable under the circumstances. *See Glenn*, 673 F.3d at 871. The court finds
 11 that Officers Smith and Wortman acted reasonably and therefore did not violate Mr.
 12 Dasho’s Fourth Amendment rights. Deadly force is reasonable where “the officer has
 13 probable cause to believe that the suspect poses a threat of serious physical harm, either
 14 to the officer or to others,” such as “if the suspect threatens the officer with a weapon.”
 15 *Garner*, 471 U.S. at 11-12; *see also Smith*, 394 F.3d at 704 (“[W]here a suspect threatens
 16 an officer with a weapon such as a gun or a knife, the officer is justified in using deadly
 17 force.”). As described above, Officers Smith and Wortman had probable cause to believe
 18 that Mr. Dasho posed a serious threat of physical harm to them, to Jared and Ms. Breen,
 19 and to anyone else who might have been in the apartment.

20 Furthermore, the Officers acted reasonably in continuing to use deadly force
 21 against Mr. Dasho as he fell. “[I]f police officers are justified in firing at a suspect in
 22 order to end a severe threat to public safety, the officers need not stop shooting until the

1 threat has ended.” *Plumhoff v. Rickard*, --- U.S. ---, 134 S. Ct. 2012, 2022 (2014).

2 Moreover, when faced with a tense, uncertain, rapidly evolving, and dangerous situation

3 such as the one that existed here, an officer may reasonably fire a volley of shots at a

4 threatening suspect, even if some of those shots are fired as the suspect falls to or lies on

5 the ground. *See Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007) (quoted and cited with

6 approval in *Sheehan v. City & Cnty. of San Fran.*, 743 F.3d 1211, 1230 (9th Cir. 2014),

7 *rev’d in part on other grounds*, --- U.S. ---, 135 S. Ct. 1765 (2015)) (“It may well be true

8 that Conley continued to fire as Berube fell to or lay on the ground. But it is clear from

9 the very brief time that elapsed that she made a split-second judgment in responding to an

10 imminent threat [of a man charging at her with a hammer] and fired a fusillade in an

11 emergency situation. Conley’s actions cannot be found unreasonable because she may

12 have failed to perfectly calibrate the amount of force required to protect herself.”); *see*

13 also *Sheehan*, 135 S. Ct. at 1775 (“Nothing in the Fourth Amendment barred Reynolds

14 and Holder from protecting themselves, even though they fired multiple rounds.”) (citing

15 *Plumhoff*, 134 S. Ct. at 2020). Here, the Officers fired a 1.5 to 3 second volley at a fast-

16 moving, muscular man who had ignored their commands and advanced on them with a

17 knife raised over his head. *See Dasho*, 171 Wash. App. at *1; (Wortman Report at 2;

18 Smith Report at 2; Wortman Decl. ¶ 5; Smith Decl. ¶ 5; Breen Dep. at 51:18-54:23;

19 Noedel Report at 6, 8-9.) Even if one might regret their failure to stop shooting at Mr.

20 Dasho as he went down, they acted reasonably in the circumstances confronting them.

21 *See Berube*, 506 F.3d at 85. Thus, Officers Smith and Wortman did not violate Mr.

22 Dasho’s Fourth Amendment rights.

1 c. *Clearly established law*

2 Furthermore, even if Officers Smith and Wortman's actions did constitute
3 excessive force, they are nevertheless entitled to qualified immunity. At the second stage
4 of the qualified immunity analysis, Mr. Dasho bears the burden to demonstrate that the
5 right allegedly violated was clearly established at the time of the shooting. *See Green*,
6 751 F.3d at 1051-52. "A Government official's conduct violates clearly established law
7 when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently
8 clear' that every 'reasonable official would have understood that what he is doing
9 violates that right.'" *al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson*, 483 U.S. at 640)
10 (alterations in original). Mr. Dasho need not provide a case "directly on point," but he
11 must show that existing precedent has "placed the . . . constitutional question beyond
12 debate." *Id.* (citing *Anderson*, 483 U.S. at 640; *Malley*, 475 U.S. at 341); *see also id.* at
13 1084 ("We have repeatedly told courts . . . not to define clearly established law at a high
14 level of generality. The general proposition, for example, that an unreasonable search or
15 seizure violates the Fourth Amendment is of little help in determining whether the
16 violative nature of particular conduct is clearly established." (internal citations omitted)).
17 Mr. Dasho has not carried his burden.

18 Mr. Dasho asserts that as of August 9, 2009, the law was clear that "the continued
19 application of force to an arrestee of civilian [sic] following the legal application of force
20 to stop a deadly threat can constitute excessive force." (Resp. at 5.) That statement,
21 although true, is insufficient to satisfy Mr. Dasho's burden. The notion that some
22 applications of force "can constitute excessive force" does not demonstrate that the

1 particular application of force here did in fact amount to excessive force under clearly
2 established law. *See al-Kidd*, 131 S. Ct. at 1084.

3 Nor do any of the cases to which Mr. Dasho cites show that pre-August 9, 2009,
4 precedent had placed the lawfulness of Officers Smith and Wortman's conduct beyond
5 debate. For example, Mr. Dasho relies on *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir.
6 1992), and *Tubar v. Clift*, 286 F. App'x 348 (9th Cir. 2008). In both of those cases,
7 however, the facts taken in the light most favorable to the plaintiffs showed that although
8 deadly force may have been justified at first, there was a pause in the events (and the
9 shooting) after which no one was in immediate danger and therefore the defendant-
10 officers' further use of deadly force was unreasonable. *See Hopkins*, 958 F.3d at 886-87
11 (finding potentially unreasonable a second set of shots after the officer had wounded,
12 disarmed, and broken away from the suspect, crossed a street, reloaded, called for
13 backup, and placed a car between himself and the suspect); *Tubar*, 286 F. App'x at 351
14 (approving district court's denial of officer's motion for summary judgment); *Tubar v.*
15 *Clift*, 453 F. Supp. 2d 1252, 1253, 1257 (W.D. Wash. 2006) (describing plaintiff's
16 evidence as showing that the officer "paused, aimed, and fired" a third shot through the
17 driver's side window after plaintiff's vehicle was moving slowly away from the officer).
18 Here, however, there is no evidence of a pause in the events or the shooting after which

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1 the Officers could reasonably have perceived that no one in the apartment was still in
 2 immediate danger from Mr. Dasho.⁴

3 Mr. Dasho's citation to *Glenn v. Washington County*, 673 F.3d 864 (9th Cir.
 4 2011), likewise fails to show that the Officers violated clearly established law. In *Glenn*,
 5 the officers responded to a report of a young man who was holding a pocket knife on
 6 himself. 673 F.3d at 867. When the officers arrived, the young man was not moving or
 7 behaving in a threatening manner toward anyone. *Id.* at 867-68. The officers were able
 8 to get everyone else away from the young man and had ample time and space within
 9 which to pursue other options. *See id.* at 868-69, 872-78. Instead, they chose to shoot
 10 him with a beanbag gun and, when that prompted him to move, with their firearms. *Id.* at
 11 869. In light of this evidence, the court determined that a jury could find that the
 12 officers' use of force was unreasonable. *See id.* at 872-79.

13 The facts of the present case are markedly different. Mr. Dasho was behaving in a
 14 manner that was threatening not just to himself but also to the Officers and to Ms. Breen
 15 and Jared. *See Dasho*, 171 Wash. App. at *1; (Wortman Decl. ¶ 5; Wortman Report at 2;
 16 Smith Decl. ¶ 5; Smith Report at 2; Breen Dep. at 51:18-54:23.) Furthermore, events
 17 unfolded precipitously and in tight space, giving the Officers little time in which to

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19 ⁴ *Brockington v. Boykins*, 637 F.3d 503 (4th Cir. 2011), which Mr. Dasho also cites, is
 20 similarly unsupportive of his position. There, the record viewed in the plaintiff's favor showed
 21 the following: that the officer shot the plaintiff several times, after which the plaintiff fell to the
 22 ground unarmed and incapacitated; that there was then a "clear break in events"; and that the
 officer then proceeded to stand over the plaintiff and shoot him six more times "execution style."
Id. at 507. As discussed above, there is no evidence here from which a jury could reasonably
conclude that there was a clear break in events during the shooting or that following such a break
the Officers stood over Mr. Dasho and shot him multiple times as he lay on the floor.

1 evaluate the situation and determine the appropriate reaction. *See Dasho*, 171 Wash.
2 App. *1; (Noedel Report at 6, 8; Breen Dep. at 49:11-20; Wortman Report at 2; Smith
3 Report at 2.) Accordingly, *Glenn* does not demonstrate that the Officers' conduct in
4 shooting Mr. Dasho violated clearly established law.

5 Thus, Mr. Dasho has failed to carry his burden to show that Officers Smith and
6 Wortman violated clearly established law. *See Green*, 751 F.3d at 1051-52.
7 Furthermore, in light of cases such as *Berube*, 506 F.3d 79 (1st Cir. 2005), *Blanford*, 406
8 F.3d 1110 (9th Cir. 2005), and *Reynolds*, 84 F.3d 1162 (9th Cir. 1996), the court finds
9 that the Officers did not violate clearly established law when they shot Mr. Dasho. For
10 these reasons, and because the court also finds that Officers Smith and Wortman did not
11 use excessive force against Mr. Dasho, Officers Smith and Wortman are entitled to
12 qualified immunity for shooting Mr. Dasho. The court therefore grants Defendants'
13 motion for summary judgment on Mr. Dasho's § 1983 excessive force claims concerning
14 the shooting and dismisses those claims with prejudice.

15 2. Prompt Medical Care

16 Mr. Dasho contends that Officers Smith and Wortman also used excessive force
17 by failing to promptly provide him with medical treatment after the shooting stopped.
18 (Resp. at 9-10.) It is undisputed that the Officers did not personally administer aid to Mr.
19 Dasho but that they promptly radioed for help. (*See* Staskiewicz Report at 15; Wortman
20 Report at 2-3; Smith Report at 2-3.) It is also undisputed that medical help arrived in
21 under four minutes in response to that call. (*See* Staskiewicz Report at 15.) Mr. Dasho
22 nevertheless takes issue with the Officers' conduct because, he argues, it would have

1 been safe for them to personally administer aid to him right away. (*See* Resp. at 10.)
2 Because they only called for help, Mr. Dasho believes the Officers violated his
3 constitutional rights. (*See id.*)

4 Officers Smith and Wortman respond that they are entitled to qualified immunity
5 because their conduct with respect to providing medical aid did not violate Mr. Dasho's
6 clearly established constitutional rights. (*See* Mot. at 15-17.) The court agrees.
7 Although the Fourth Amendment requires the provision of medical care to persons who
8 have been injured during an arrest, the police may satisfy that obligation by "promptly
9 summon[ing] the necessary medical assistance." *Tatum v. City & Cnty. of San*
10 *Francisco*, 441 F.3d 1090, 1098-99 (9th Cir. 2006) (citing *Graham*, 490 U.S. at 395; *City*
11 *of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Maddox v. City of L.A.*, 792
12 F.2d 1408, 1415 (9th Cir. 1986)); *see also id.* at 1099 ("[T]he critical inquiry is not
13 whether the officers did all they could have done, but whether they did all that the Fourth
14 Amendment requires. Here, the officers promptly requested medical assistance, and the
15 Constitution requires them to do no more."). As it is undisputed that Officers Smith and
16 Wortman promptly summoned medical care, Mr. Dasho cannot maintain his claim based
17 on the denial of medical care. *See Tatum*, 441 F.3d at 1098-99. Thus, the court grants
18 Defendants' motion insofar as it concerns Mr. Dasho's § 1983 claim for denial of
19 medical care and dismisses that claim with prejudice.

20 **D. Municipal Liability**

21 Mr. Dasho's complaint also alleges that Federal Way violated his constitutional
22 rights by ratifying the Officers' conduct and through its own policies and customs. (*See*

1 Compl. ¶¶ 4.13, 6.2 (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)).)

2 Defendants attack those claims on the ground that Mr. Dasho has no evidence to support

3 them. (See Mot. at 20-24.) Mr. Dasho concedes this point in his response and requests

4 that the court dismiss his claims against Federal Way. (See Resp. at 1.) The court finds

5 that Defendants have met their burden of showing that there is no genuine issue of

6 material fact and that they are entitled to judgment as a matter of law on the claims

7 against Federal Way. Accordingly, the court grants summary judgment on and dismisses

8 the claims against Federal Way with prejudice.

IV. CONCLUSION

10 For the foregoing reasons, the court GRANTS Defendants' motion for summary
11 judgment (Dkt. # 44), STRIKES as moot Defendants' motions in limine (Dkt. # 66), and
12 DISMISSES this case with prejudice.

13 Dated this 17th day of June, 2015.

John P. Blunt

JAMES L. ROBART
United States District Judge